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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TAI HUYNH,

Defendant and Appellant.
_____/

H024351

(Santa Clara County Superior Court No. C9806482)

The appeal in this case follows defendant Tai Huynh's prior appeal in case number H020840 and the remand for resentencing in that appeal.[1]

Tai Huynh (hereinafter "defendant") and one of his codefendants, Tuan Van Le (Le), were charged by information with first-degree burglary (Pen. Code, § 459/460, subd. (a) [count 1]),[2] attempted robbery of an inhabited dwelling (§ 664/211/212.5, subd. (a) [count 2]), and three counts of false imprisonment (§ 236/237 [counts 3 through 5]). Defendant and Le were alleged to have been armed with a firearm (§ 12022. 1, subd. (a)) and to have used a firearm (§§ 1203.06, 12022.5, subd. (a)(1))

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[1] Pursuant to Evidence Code, section 452, subdivision (d), we take judicial notice of the record from defendant Huynh's prior appeal in *People v. Huynh*, case No. H020840.

[2] All further statutory references are to the Penal Code unless otherwise specified.

during the commission of each offense. Shortly after a joint trial began, a mistrial was declared as to defendant. At the conclusion of his second trial, a jury convicted him of all charges and found true each enhancement allegation. Defendant was sentenced to 28 years in state prison.[3] In his first appeal he contended his sentence for the attempted robbery and the accompanying enhancement must be stayed under section 654. We agreed and remanded defendant's case for resentencing. Upon remand, the trial court resentenced defendant to 28 years in state prison. In the present appeal, defendant contends the false imprisonment counts must be stayed under section 654 because the false imprisonment of the adult victim and her two children was incidental to the burglary and attempted robbery. In a procedural argument, he contends the law-of-the case doctrine does not bar relief.

FACTS[4]

At approximately 7:30 p.m. on October 29, 1998, defendant and three other individuals broke into a house in San Jose, believing the resident was an Asian male who kept a lot of money in the house and would not be home at the time. They intended to take the money kept inside the house. To the burglars' surprise, the owner had moved. The new tenants, Stefan Derdak, his wife Ildiko, and their three-year-old twin boys, Nicholas and Peter, recently had arrived here from Germany.[5]

When the four armed and masked men entered, Ildiko and her sons were alone in the house and seated on the living room couch. When Ildiko saw the masked men, she tried to flee with the twins. She was restrained at the front door by defendant Huynh, who held a gun mounted with what appeared to be a silencer to her head and

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[3] The probation report notes that Le was sentenced to state prison for 22 years following his conviction on all charges.

[4] We adopt verbatim our statement of the facts as set forth in defendant's prior appeal.

[5] In order to simplify our discussion of the facts and the law, we shall refer to Mr. and Mrs. Derdak as Stefan and Ildiko.

threatened to "blow [her] head off" if she moved. He then asked, "Where's the money?"[6] The three other intruders also pointed their guns and demanded money from Ildiko, who said she did not have any cash and offered to surrender anything else they wanted. The covering defendant Huynh wore around his face fell down as he held Ildiko at the door while his associates ran around searching the house. Having been able to see defendant's entire face, Ildiko identified him in court as the intruder who had held the gun to her head.

After five to seven minutes the burglars herded Ildiko and her sons into the bathroom, where defendant bound Ildiko's hands and legs with duct tape while telling her he was sorry. As Ildiko was being tied, one of the intruders tried to remove her necklace, ring and watch, but another one, possibly defendant, interceded. This same individual apologized to the Derdaks but told Ildiko that if she tried to get free or call the police, he would come back and kill them. The four intruders left after ransacking the residence for another five minutes after the Derdaks were forced into the bathroom.

About 15 minutes later, Stefan arrived home and called 911. Responding officers found one of the burglars, Charles Nichols, hiding on the floor of his car, which was parked near the Derdak home. After he was arrested, Nichols described the entire home invasion plot to police and identified defendants Huynh and Le as two of the four participants in the burglary. At trial, Nichols said he had lied to police to obtain lenient treatment, that, in fact, Huynh and Le were not his crime partners.

Defendant was arrested at his home. Initially, he told San Jose Police Detective Boyd he had been home all night and denied knowing Charles Nichols. Shown a written apology by Le, defendant's attitude changed. Almost in tears, he said he did

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[6] In fact, Ildiko testified that the person said, "Where's the money?" and "Where is your money?"

not hurt anyone and that the guns were toys. He later wrote the following letter of apology: "I did not want to hurt nobody. I sorry. Tai Huynh."

DISCUSSION

Defendant contends his sentence on the false imprisonment counts violates former section 654, which provided, in pertinent part, that "[a]n act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one."

We first set forth the procedural history of the case before considering whether defendant waived this section 654 issue by failing to raise it in his earlier appeal or whether the law-of-the-case doctrine bars consideration of the section 654 issue raised by defendant in the instant appeal.

At the initial sentencing hearing in 1999, the trial court first identified the residential burglary conviction (count 1) as the principal term. It imposed the upper term of six years on that count and added a ten-year enhancement for use of a firearm. The court next imposed a consecutive four-year term for the attempted robbery (count 2) by taking one-third the midterm of four years for the substantive offense (sixteen months), then halving that amount because the crime was an attempt (eight months), and adding to that a consecutive enhancement of one-third the ten-year aggravated term for use of a firearm (three years and four months). For the false imprisonment of Mrs. Derdak (count 3), the court imposed the aggravated term of three years plus the aggravated ten-year term for use of a firearm, a total of thirteen years, to be served consecutively. The court then stayed this sentence, believing section 654 applied to the mother's false imprisonment and the attempted robbery. For each of the two false imprisonment convictions for the twin boys (counts 4 and 5), the trial court imposed consecutive four-years terms: one-third the midterm of two years (eight months) was added to one-third the aggravated term of ten years (three years, four months) for use

of a firearm. The total term imposed was 16 years plus 4 years plus 4 years plus 4 years. On appeal, defendant sought to reduce his 28-year sentence to 24 years by obtaining a stay for the attempted robbery term and accompanying enhancement. He did not challenge the correctness of the four-year calculation for the attempted robbery plus the enhancement. Instead, he contended section 654 required the four years to be stayed, arguing the trial court "erred in imposing multiple punishment for burglary and robbery because there is no substantial evidence that the objective of the robbery was different than the objective of the burglary."

In response, the People argued that, if the attempted robbery four-year term were stayed, no section 654 problem would exist as to the previously-stayed false imprisonment conviction involving Mrs. Derdak. The People urged this court to remand for resentencing in the event we found error so that the trial court would have the opportunity to impose the false imprisonment count consecutive to the burglary count.

In our unpublished opinion reversing the judgment and remanding for resentencing, we determined the sentence on the attempted robbery count should have been stayed pursuant to section 654. Rejecting defendant's claim that "there [was] no need to remand for resentencing because the false imprisonment of Mrs. Derdak was committed as a means of carrying out . . . the burglary," we concluded "the trial court could properly have found, based upon the evidence before it, that defendant entertained multiple criminal objectives which were independent and not merely incidental to each another, i.e., an objective to commit a burglarious entry of the home to steal and a separate objective to bind with duct tape and falsely imprison anyone whom defendant and his confederates might encounter inside the house." We noted that the fact defendants brought the duct tape with them which they used to bind Mrs. Derdak and which they considered using to bind her children was evidence that supported "the trial court's implicit finding that the burglary for theft and the false

imprisonments were products of two separate intents and objectives which were harbored simultaneously, namely the intent and objective to commit a theft inside the identified residence, and the separate and independent intent and objective to prevent its occupants from thwarting their movements inside the residence and their ability to escape."

At the resentencing hearing that ensued, the trial court again imposed a 16-year term for the burglary count. It stayed sentence on the attempted robbery count in accordance with our order in the prior appeal, and it imposed three consecutive four-year terms on each of the false imprisonment counts. Defendant's total state prison sentence was 28 years. In sentencing defendant, the trial court explained that it believed section 654 did not bar imposition of the sentences on the three false imprisonment counts because, "[i]n my sentencing choices I find that you exercised an independent intent and objective to prevent the . . . people within the house, from thwarting your movements or the movements of your cohorts inside the residence and then their ability to in any way prevent your escape. As a result, . . . [t]he court is not subject to the provision of section 654 limitations regarding separate violations of 236, the false imprisonment charges as to the mother and the two children, and is not barred by limitations of section 654 as it would pertain to the burglary. More specifically, I am finding that you entered the residence, you not only had the separate intent to commit the burglary, you had a separate intent that was demonstrated by the accoutrements that you took into that house, more specifically the tape that was used to bind and secure the victims."

Citing *People v. Senior* (1995) 33 Cal.App.4th 531, 538, the People claim defendant is barred from challenging the trial court's section 654 ruling with regard to the burglary count and the false imprisonment counts because he "previously conceded that there was no section 654 problem with the sentences on the false imprisonment counts involving the children being imposed in addition to the sentence on the

burglary count." We are unpersuaded by this claim since a court "acts in 'excess of its jurisdiction' and imposes an 'unauthorized' sentence when it erroneously stays or fails to stay execution of a sentence under section 654." (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) Such error is subject to correction if it "comes to our attention in a case pending before us" (*People v. Davis* (1981) 29 Cal.3d 814, 827, fn. 5) even if it could have been raised earlier. (See, e.g., *Neal v. State of California* (1960) 55 Cal.2d 11, 16 [section 654 claim can be raised for first time on habeas corpus even though issue could have been raised on appeal].)

We next consider the People's contention that the law-of-the-case doctrine bars consideration of the section 654 issues raised by defendant in the present appeal.

"'The doctrine of the law of the case is this: That where, upon an appeal, the supreme court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, and, as here assumed, in any subsequent suit for the same cause of action, and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular." (*People v. Shuey* (1975) 13 Cal.3d 835, 841.) The doctrine, which has been held to apply to criminal matters and to decisions of intermediate appellate courts (i*bid.*), "applies exclusively to issues of law, and not those of fact." (*Cooper v. County of Los Angeles* (1977) 69 Cal.App.3d 529, 536.)

Application of the rule is "subject to the qualifications that 'the point of law involved must have been necessary to the prior decision, that the matter must have been actually presented and determined by the court, and that application of the doctrine will not result in an unjust decision.' [Citation.]" (*People v. Shuey, supra,* 13 Cal.3d at p. 842.) "The unjust decision exception does not apply when there is a mere disagreement with the prior appellate determination." (*People v. Stanley* (1995) 10

Cal.4th 764, 787.) As noted, since the doctrine "is a rule of procedure, it does not go to the court's power, and will not be given effect where its application will result in an unjust decision." (*Cooper v. Los Angeles*, *supra*, 69 Cal.App.3d at p. 536.) In order for the unjust exception to apply, "there must at least be demonstrated a manifest misapplication of existing principles resulting in substantial injustice," or the controlling rules of law must have been altered or clarified by a decision intervening between the first and second appellate determinations. (*People v. Shuey*, *supra*, 13 Cal.3d 835, 846.)

Defendant contends the doctrine does not cover his case because the determination of whether there is more than one objective is a factual determination; alternatively, he argues that, assuming arguendo the law-of-the-case doctrine applies, "imposition of consecutive sentences in this case is a 'manifest misapplication of existing principles' that results in a prison sentence far longer than that authorized by law. [Citation.]"

When we concluded in our prior opinion that sufficient evidence supported the trial court's implicit finding that the burglary and false imprisonments were products of two separate intents and objectives, we did not decide any issues of fact. A legal determination regarding the sufficiency of evidence is an issue of law, not of fact. (*People v. Shuey*, *supra*, 13 Cal.3d at p. 842; see also *Stromer v. Browning* (1968) 268 Cal.App.2d 513, 521.)

Furthermore, we are convinced that our prior decision did not contain "a manifest misapplication of existing principles" that resulted "in substantial injustice" (*People v. Shuey*, *supra*, 13 Cal.3d 835, 846) to defendant for the same reason that, assuming arguendo the law of the case doctrine does not preclude defendant from raising his section 654 challenges in the instant appeal, we conclude that section 654 does not preclude punishment on both the burglary and false imprisonment counts.

Where an indivisible course of conduct involves multiple criminal violations, it is the criminal objective of each violation that determines whether section 654 applies; if the criminal objective is the same throughout, only one violation may be punished. (*People v. Beamon* (1973) 8 Cal.3d 625, 638; *Neal v. State of California* (1960) 55 Cal.2d 11, 19-20).

Here, even though the burglary, which was pleaded and proven to be an entry "with the intent to commit theft," may have been part of a course of conduct intertwined with the false imprisonments, the trial court properly found, based upon the evidence before it, that defendant entertained multiple criminal objectives which were independent and not merely incidental to each other, i.e., an objective to commit a burglarious entry of the home to steal and a separate objective to bind with duct tape and falsely imprison anyone whom defendant and his confederates might encounter inside the house. In this respect, defendant's case is similar to *People v. Nelson* (1989) 211 Cal.App.3d 634 (*Nelson*), in which the evidence showed that the defendant and his accomplices had a plan to break into the victims' house, knock them out, and rob them of money and gold. After noting that a determination as to whether pertinent acts constituted an indivisible course of conduct primarily is a factual issue for the trial court on the basis of its findings concerning the defendant's intent and objective in committing those acts, the *Nelson* court observed that when the trial court makes no express findings on the section 654 issue, imposition of separate sentence terms may constitute an implicit finding that the defendant's offenses were divisible. The court went on to explain that an implied finding to that effect would be upheld if supported by the evidence. (*Id*. at p. 638.)

The *Nelson* court reasoned that "[i]f defendant's only object was to steal the victims' gold and money, he could have accomplished that simply by waiting until they were away to enter their home. A rational plan designed to accomplish theft alone would rely on stealth instead of violence. . . . Indeed, frustration of theft is such

an obvious, inherent risk in the predictable resistance of residents to nocturnal intruders that it strongly suggests defendant and his cohorts were not bent on thievery alone. On this record, it is reasonable to infer, as we assume the trial judge did, that theft was not the burglars' only object and purpose. Rather, they deliberately chose to enter the McLeod residence while the victims were at home, knowing as they must that their presence reduced the chances of a successful theft, because separate and apart from thievery they intended to inflict physical harm upon the victims. [Fn. omitted.] Therefore defendant is deserving of the more serious punishment without benefit of the mitigating effect of . . . section 654." (*Id*. at pp. 638-639.)

Here, where defendant and his cohorts not only brought firearms with them, but they also brought duct tape which they used to bind Ildiko Derdak and which they considered using to bind her children, the evidence supports the trial court's finding that the burglary for theft and the false imprisonments were products of two separate intents and objectives which were harbored simultaneously, namely the intent and objective to commit a theft inside the identified residence, and the separate and independent intent and objective to prevent its occupants from thwarting their movements inside the residence and their ability to escape. Defendant therefore, like the defendant in *Nelson*, was deserving of the more serious punishment for both the burglary and the false imprisonments without benefit of section 654. (*People v. Nelson*, *supra*, 211 Cal.App.3d at pp. 638-639; see also *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1393-1394.)

We are not persuaded by defendant's claim that his case should be governed by the holding in *People v. Han* (2002) 78 Cal.App.4th 797. In that case, the defendants were convicted of conspiracy to commit murder, burglary, and false imprisonment. The armed defendants had forced their way into the victim's apartment, bound them, and forced them into a bathtub. Before the defendants discovered one of the victims, she called 911. While in the bathroom, the victims heard someone going through a

purse. When police arrived, one of the defendants rushed into the bathroom to untie the victims and urge them to tell police that the whole episode was a joke. Police later discovered that the twin sister of one victim had orchestrated the attack, presumably in a effort to take over her sister's identity. (*Id.* at pp. 799-803.) On appeal the Attorney General conceded the sentence on the false imprisonment count should have been stayed pursuant to section 654. (*Id*. at p. 809.) The appellate court agreed, implicitly finding that it could have inferred from the evidence in *Han* that the defendant entered the residence with the intent to restrain the victim for the purpose of killing her and noting that, "[w]hile the conspirators did steal some of [the victim's] property from her purse, that was arguably an incidental objective." (*Id*. at pp. 804-805.)

Here, where a reasonable trier of fact could find that defendant entered the Derdak home with discrete objectives of theft and false imprisonment, we conclude the trial court did not violate section 654 in imposing sentence for both the burglary count and the false imprisonment counts.[7]

## III. Disposition

The judgment is affirmed.

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[7] We note that a defendant who entertained a single criminal objective throughout a course of conduct "may nevertheless be punished for multiple convictions if during the course of that conduct he committed crimes of violence against different victims" (*People v. Miller* (1977) 18 Cal.3d 873, 885) and that the true findings on the firearm enhancements made defendant's crimes "violent" within the contemplation of *Miller* and its progeny. (§ 667.5, subd. (c)(8); *People v. Centers* (1999) 73 Cal.App.4th 84, 89.) Accordingly, the trial court properly sentenced defendant to a separate prison term on each of the false imprisonment counts in this case.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Wunderlich, J.